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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 710

AMANA REFRIGERATION, INC.,

Petitioner,

against

COLEMAN BROADCASTING CORP. and COLEMAN, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

AMANA REFRIGERATION, INC., *Petitioner,* —*against*— COLUMBIA BROADCASTING SYSTEM, INC., *Respondent.*	No. 710

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The orders of the District Court are printed in the Appendix to the brief Petitioner filed with the Court of Appeals, copies of which have been filed with this Court. The opinion of the Court of Appeals is reported, *sub. nom., Columbia Broadcasting System, Inc.* v. *Amana Refrigeration, Inc.*, at 271 F. 2d 257.

JURISDICTION

The judgment of the Court of Appeals was entered October 20, 1959 (Pet. B-1*). The petition for rehearing was denied by order entered November 24, 1959 (Pet. C-1). Petitioner invokes the jurisdiction of this Court under 28 U. S. C. § 1254(1) and 28 U. S. C. § 1651.

*References preceded by the designation "Pet." are to pages of Amana's petition.

QUESTIONS PRESENTED

(1) Whether this Court should review the holding of the Court of Appeals that the District Court abused its discretion in allowing an appeal under Rule 54(b) of the Federal Rules of Civil Procedure, when such holding:

(a) is within the area of review committed to the Court of Appeals by this Court's decision in *Sears, Roebuck & Co.* v. *Mackey*, 351 U. S. 427 (1956);

(b) does not conflict with any other decision; and

(c) is clearly correct?

(2) Whether, in any event, it is appropriate for this Court to review a substantive decision of the District Court which has not yet been reviewed by the Court of Appeals, there being no reason for departing from the usual policy of first having the benefit of consideration by that Court?

STATUTE AND RULE INVOLVED

Section 1291 of the Judicial Code (28 U. S. C. § 1291) fixes the appellate jurisdiction of the courts of appeals as follows:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

The entry of a final judgment disposing of some, but less than all, of the claims for relief asserted in an action

is governed by Rule 54(b) of the Federal Rules of Civil Procedure, which provides:

> "*Judgment Upon Multiple Claims.* When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, the court may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims."

STATEMENT

Respondent, (CBS) brought this action to recover $284,545.21 from Petitioner (Amana) for services rendered by CBS in connection with broadcasts of The Phil Silvers Show under Amana's sponsorship over the CBS Television Network (App., 4-6*). Such services were rendered by CBS pursuant to two agreements: the Program Agreement which, in part, provided that CBS produce a filmed series of The Phil Silvers Show for broadcast on behalf of, and under limited license to, Amana during a stated term and at a stated price; and the Facilities Agreement, which, in part, provided that CBS would cause The Phil Silvers Show to be broadcast under Amana's sponsorship over the various television stations specified in Exhibit A thereto (R. App., 53-71).

*References preceded by the designations "App." and "R. App." are to pages of the appendices annexed to the briefs filed with the Court of Appeals by Amana and CBS, respectively. Copies of those appendices have been filed with this Court.

Amana answered and interposed a compulsory counterclaim for treble damages of $9,000,000 (App., 6-17). The counterclaim averred violation of the antitrust laws in connection with Amana's sponsorship of The Phil Silvers Show over the CBS Television Network pursuant to said Program Agreement and Facilities Agreement. The Program Agreement and Facilities Agreement are designated by Amana in paragraphs 6, 12 and 17 of its counterclaim as the "integral agreement" (App., 9, 11, and 13) and will, solely for the purpose of brevity, be so referred to herein.

Amana's counterclaim consists of three interrelated parts, each bottomed upon the same transaction or set of factual occurrences.

The basic transaction is set forth in paragraphs 2 through 7, inclusive, wherein Amana states the business of CBS and Amana (pars., 2-3*); the making of some of the terms of the Facilities Agreement, and, more particularly of the proviso that discounts to be granted shall be in accordance with the provisions of the CBS Television Network Rate Card No. 11 (par., 4); the making of the Program Agreement (par., 5); and that, pursuant to the Facilities Agreement and the Program Agreement, defendant sponsored The Phil Silvers Show on specified dates and times over the CBS Television Network (pars., 6-7). Amana makes those averments applicable to each part of its counterclaim (pars., 2, 7, 12 and 17).

The first part of Amana's counterclaim (pars., 1-10) focuses upon the basic transaction (pars., 2-7) for the purpose of charging violation of Section 2(a) of the Clayton Act, as amended (15 U. S. C. Section 13(a)), claiming CBS granted greater discounts to its "favored advertisers" than to Amana in its sponsorship of The Phil Silvers Show.

*References preceded by the designation "par." or "pars." are to paragraphs of Amana's counterclaim (App., 8-14).

pursuant to said Rate Card No. 11 (par., 8), and that the alleged differences in discounts purportedly injured Amana in violation of the antitrust laws (pars., 9 and 10).

The second part of the counterclaim (pars., 11-15) focuses upon the basic transaction (pars., 2-7) to charge violation of Section 1 of the Sherman Act (15 U. S. C. § 1), and Section 3 of the Clayton Act (15 U. S. C. § 14), by reason of an alleged requirement that Amana, as a condition of sponsorship, had to agree to undertake the sponsorship of The Phil Silvers Show over a specified group of television stations set forth in said Rate Card No. 11 (par., 13), and that said requirement violated the antitrust laws (pars., 14 and 15).

The third part of the counterclaim (pars., 16-22) focuses upon the basic transaction (pars., 2-7) to charge violation of Section 1 of the Sherman Act (15 U. S. C. § 1) and Section 3 of the Clayton Act (15 U. S. C. § 14), by reason of an alleged requirement that Amana had to agree to sponsor The Phil Silvers Show, in which CBS purportedly had a financial interest, in lieu of a program in which CBS allegedly had no such interest (pars., 18 and 20), and that such alleged requirement injured Amana and violated the antitrust laws (pars., 21 and 22).

CBS moved to dismiss the first of the three parts of the counterclaim on the ground that Section 2(a) of the Clayton Act (15 U. S. C. § 13(a)) was inapplicable to the television networking services supplied by CBS to Amana because neither the Section 2(a) requirement of "commodities", nor of "purchasers", nor of "like grade and quality" was present (App., 18-19). The District Court granted the CBS motion and entered an order of dismissal on February 17, 1959 (App., 26-27).

Thereafter, Amana applied to the District Court, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, for certification "that there is no just reason for

delay", and for "an express direction" for entry of final judgment (App., 27-28). CBS opposed upon the grounds that the order was not a "final decision" within the meaning of Section 1291 of the Judicial Code (28 U. S. C. § 1291), that no justifiable reason existed for review prior to final judgment on the entire case, and that, therefore, the order was not properly certifiable. On March 31, 1959, the District Court granted Amana's application for certification (App., 28-29).

On April 27, 1959, Amana filed its notice of appeal (App., 29-30). CBS moved to dismiss on the same grounds as it had urged in opposing Amana's application to the District Court and on the further ground that it was an abuse of discretion on the part of the District Court to grant the Rule 54(b) certificate.

On October 20, 1959, the Court of Appeals dismissed Amana's appeal (271 F. 2d 257). On November 24, 1959, Amana's petition for rehearing was denied (Pet., C-1).

ARGUMENT

Amana urges a grant of certiorari* by contending that (a) the Court of Appeals' decision dismissing Amana's appeal is in conflict with that in *Sears, Roebuck & Co.* v. *Mackey*, 351 U. S. 427 (1956) (Pet., 6-12) and (b) notwithstanding the fact that the Court of Appeals has not yet passed upon the substantive issue resolved by the District Court, it would be convenient to have this Court render an opinion in respect of the legal question determined by the District Court (Pet., 12-17).

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*Amana also asserts jurisdiction under the "All Writs" provision of 28 USC § 1651 but asks for no relief thereunder and has failed to file the motion which is required by Rule 31 of the Rules of this Court for such relief. Accordingly, that branch of Amana's application is defective and must be rejected.

I.

NO REASON EXISTS WARRANTING REVIEW OF THE DECISION OF THE COURT OF APPEALS.

This case wholly lacks the "special and important reasons" which are required for review by certiorari. Instead, it is simply an effort to get this Court to review the ruling of the Court of Appeals that the District Court abused its discretion in permitting an appeal under Rule 54(b), despite the fact that this is a matter which the Court of Appeals is required to review under *Sears, Roebuck & Co.* v. *Mackey*, 351 U. S. at 437, and in the exercise of which it has "a duty of independent judgment broader than is implied by the usual flavor of the phrase 'abuse of discretion'." (*Sears, Roebuck*, 351 U. S. at 440—concurring opinion). The holding below thus merely determined whether discretion was properly exercised under a particular set of factual circumstances, and does so in a manner consistent with the principles enunciated by this Court. It accordingly presents no important issue, or conflict of decisions, justifying review by this Court. In addition, the holding is clearly correct, not only for the reason stated below but also on the alternative and equally compelling ground that the order appealed from is not "final" within the meaning of Section 1291 of the Judicial Code.

Amana's Appeal Was Properly Dismissed.

It is now well established that Rule 54(b) fixes three separate requirements for appealability in multiple claims actions: (1) a "final" decision within the meaning of Section 1291 of the Judicial Code; (2) a proper discretionary determination "that there is no just reason for delay"; and (3) "an express direction for the entry of judgment" by the grant of the necessary certificate. *Sears, Roebuck*, 351

U. S. 427; *Cott Beverage Corp.* v. *Canada Dry Ginger Ale, Inc.*, 243 F. 2d 795 (2d Cir. 1957); *Flynn & Emrich Company* v. *Greenwood*, 242 F. 2d 737 (4th Cir. 1957), *cert. denied*, 353 U. S. 976 (1957).

The District Court's order was not appealable because (a) a valid discretionary determination of "no just reason for delay" had not been made and (b) the order lacked "finality".

(1) The Decision Below is Correct and There is No Conflict.

The Court of Appeals held (271 F. 2d at 258) "that the District Court's determination that there was no just reason for delay was an abuse of discretion". Accordingly, Amana's appeal was dismissed, the Court stating:

> "The prosecution of an appeal from the order dismissing the portion of the counterclaim serves to delay the trial of the principal claim and remaining portions of the counterclaim without in any way either simplifying or facilitating the conduct of the future litigation. The instant case presents no hardship or unfairness which would justify discretionary departure from the normal rule as to the time of the appeal." 271 F. 2d at 259.

Amana, relying upon *Sears, Roebuck*, appears to contend that the decision below is incorrect because (1) the Court of Appeals has little or no power to review, but must accept, the District Court's finding of "no just reason for delay" and (2) the only standard which the Court of Appeals could apply, in determining the propriety of the District Court's action, is whether the order appealed from is "final". In so contending, Amana not only confuses the separate requirements of "finality" and the exercise of discretion, but also inaccurately describes this Court's holding in *Sears, Roebuck*. Amana's argument might have had some colorable basis under Rule 54(b) as originally promul-

gated and, possibly, prior to this Court's decision in *Sears, Roebuck*. Today it is wholly untenable.

As originally promulgated, Rule 54(b) had but one requirement—"finality"—which was fulfilled only if the dismissed claims were based upon "differing occurrences or transactions" from those giving rise to the claims remaining for disposition. *Reeves* v. *Beardall*, 316 U. S. 283, 285 (1942). Because difficulty soon arose in applying the original rule—primarily in determining the proper timing of an appeal—Rule 54(b) was amended. *Sears, Roebuck*, 351 U. S. at 433-434. *Cf. Dickinson* v. *Petroleum Conversion Corp.*, 338 U. S. 507 (1950).

Amended Rule 54(b) overcame the uncertainties of the original rule by empowering the district court, in the first instance, to consider whether the order of which review was sought was (a) ready for appeal and (b) "final". *Sears, Roebuck*, 351 U. S. at 435, 437. Amended Rule 54(b) now requires the district court to manifest its conclusion by certifying "that there is no just reason for delay" and directing the entry of judgment. *Ibid.* The power thus granted was not, however, intended to in any way relax the statutory requirements of "finality" or the historic policy prohibiting piecemeal appeals. *Sears, Roebuck*, 351 U. S. at 438. Compare *Baltimore Contractors, Inc.* v. *Bodinger*, 348 U. S. 176 (1955). As stated by the Advisory Committee which formulated amended Rule 54(b):

> "The historic rule in the federal courts has always prohibited piecemeal disposal of litigation and permitted appeals only from final judgments except in those special instances covered by statute. . . . Rule 54(b) was originally adopted in view of the wide scope and possible content of the newly created 'civil action' in order to avoid the possible injustice of a delay in judgment of a *distinctly separate claim* to await adjudication of the entire

case. It was not designed to overturn the settled federal rule stated above . . .

". . . After extended consideration, it [the Committee] concluded that a retention of the older federal rule was desirable, and that *this rule needed only the exercise of a discretionary power to afford a remedy in the infrequent harsh case to provide a simple, definite, workable rule.* This is afforded by amended Rule 54(b). It re-establishes an ancient policy with clarity and precision. . . ." *Report of Proposed Amendments to Rules of Civil Procedure for the District Courts of the United States*, 70-72 (1946) (Emphasis added.)

Shortly after amendment of Rule 54(b) a conflict of judicial views* developed among the courts of appeals. One view held that the district court's determination of "no just reason for delay" and its entry of final judgment, were conclusive, and, except where an order was too glaringly interlocutory, the courts of appeals were thereby compelled to entertain the appeal. The contrary view maintained that that interpretation would make the Rule invalid and that the Rule simply had the "negative effect" of precluding all appeals in multiple claims actions unless the district court had made the requisite certificate.

In *Mackey* v. *Sears, Roebuck & Co.*, 218 F. 2d 295 (7th Cir. 1955), the claims, dismissal of which was sought to be appealed, arose under the antitrust laws. The remaining claims were common law counts. The Court of Appeals denied a motion to dismiss the appeal and this Court granted certiorari, primarily to resolve the above-mentioned conflict of judicial views. *Sears, Roebuck*, 351 U. S. at 429. In affirming the denial of the motion to dismiss the appeal, this Court adopted the "negative effect" approach to Rule 54(b) (351 U. S. at 435, 438) and held that the District

*The bulk of the cases supporting those divergent views are cited in *Sears, Roebuck*, 351 U. S. at 429, n. 1.

Court is merely the "dispatcher", "permitted to determine, in the first instance, the appropriate *time when each 'final decision'* upon 'one or more but less than all' of the claims in a multiple claims action is ready for appeal." *Sears, Roebuck*, 351 U. S. at 435.

This Court then specifically rejected the contention now urged by Amana—that the Court of Appeals is foreclosed from reviewing the propriety of the grant of the Rule 54(b) certification—stating:

> "... The District Court *cannot*, in the exercise of its discretion, treat as 'final' that which is not 'final' within the meaning of § 1291. But the District Court *may*, by the exercise of its discretion in the interest of sound judicial administration, release for appeal final decisions upon one or more, but less than all, claims in multiple claims actions. The timing of such a release is, with good reason, vested by the rule primarily in the discretion of the District Court as the one most likely to be familiar with the case and with any justifiable reasons for delay. With equally good reason, any abuse of that discretion remains reviewable by the Court of Appeals." 351 U. S. at 437.

The scope of the Court of Appeals' power to determine whether there had been an "abuse of discretion" was clarified in the concurring opinion of Justice Frankfurter, in which Justice Harlan joined, as follows:

> "... In other instances where a district court's ruling can be upset only for an abuse of its discretion, the scope of review is necessarily narrow. Here, in regard to the present problem, what is to come under review is a newly modified requirement of finality. But the requirement continues to be based upon a statute, *viz.*, 28 U. S. C. § 1291, and that statute defines and constricts the jurisdiction of the courts of appeals. Therefore the issue of compliance with this congressional command would, I should sup-

> pose, cast upon the courts of appeals a duty of independent judgment broader than is implied by the usual flavor of the phrase 'abuse of discretion'." 351 U. S. at 440.

Sears, Roebuck thus refutes Amana's contention that "finality" is the only requirement for Rule 54(b) certification. The "timing of such a release"—the determination whether there are any "justifiable reasons for delay"—is a further requirement, and, though it is left in the first instance for decision by the district court in the exercise of its discretion, that exercise of discretion "remains reviewable by the Court of Appeals". *Sears, Roebuck*, 351 U. S. at 437. See also *Cold Metal Process Co.* v. *United Engineering & Foundry Co.*, 351 U. S. 445 at 452-453 (1956); *Panichella* v. *Pennsylvania R. R. Co.*, 252 F. 2d 452 (3d Cir. 1958). Compare, Justice Frankfurter's opinion concurring in *Sears, Roebuck* and dissenting in *Cold Metal*, 351 U. S. at 439.

Manifestly, the grant of Rule 54(b) certification is not a mere "formality" to be granted "routinely or as a courtesy or accommodation to counsel". *Panichella* v. *Pennsylvania R. R. Co.*, 252 F. 2d at 455. Section 1291 of the Judicial Code and the historic policy against piecemeal appeals compel the sparing exercise of the discretionary power of certification and the limitation of that exercise to the "infrequent harsh case". *Panichella* v. *Pennsylvania R. R. Co.*, 252 F. 2d at 454-455; *Report of Proposed Amendments to Rules of Civil Procedure For The District Courts of the United States*, 72 (1946). See also *Sears, Roebuck*, 351 U. S. at 440-441 (concurring opinion); *Bendix Aviation Corp.* v. *Glass*, 195 F. 2d 267, 269 (3d Cir. 1952); *Lopinsky* v. *Hertz Drive-Ur-Self Systems*, 194 F. 2d 422, 427 (2d Cir. 1951) (concurring opinion); *Winsor* v. *Daumit*, 179 F. 2d 475, 476 (7th Cir. 1950).

This is not the infrequent harsh case, as the Court of Appeals carefully pointed out.

(2) The Order Sought to be Appealed is Not "Final".

Although the Court below found it unnecessary to rely thereon for its decision, Amana's appeal was subject to dismissal on still another ground. The order sought to be appealed from is not "final" within the meaning of Section 1291 of the Judicial Code. Hence, notwithstanding Rule 54(b) certification, it is not an appealable order.

This Court and the courts of appeals have repeatedly held that "finality", within the meaning of Section 1291, is not present unless the dismissed claims are founded upon a factual basis separate from and independent of the claims remaining for disposition. *Reeves* v. *Beardall*, 316 U. S. 283 (1942); *Seaboard Machinery Corp.* v. *Seaboard Machinery Corp.*, 267 F. 2d 178 (2d Cir. 1959); *Schwartz* v. *Eaton*, 264 F. 2d 195 (2d Cir. 1959); *Cott Beverage Corp.* v. *Canada Dry Ginger Ale, Inc.*, 243 F. 2d 795 (2d Cir. 1957); *Flynn & Emrich Co.* v. *Greenwood*, 242 F. 2d 737 (4th Cir. 1957), *cert. denied*, 353 U. S. 976 (1957); *Gold Seal Co.* v. *Weeks*, 209 F. 2d 802, 808 (D. C. Cir. 1954); *Coffman* v. *Federal Laboratories, Inc.*, 171 F. 2d 94, 96-97 (3d Cir. 1948), *cert. denied*, 336 U. S. 913 (1949).

Thus, as stated by Justice Douglas in *Reeves*:

> "The Rules make it clear that it is 'differing occurrences or transactions, which form the basis of separate units of judicial action.' Atwater v. North American Coal Corp., 111 F (2d) 125, 126. And see Moore, op. cit., 92-101; 49 Yale L.J. 1476. . . ." 316 U. S. at 285.

Likewise, in *Sears, Roebuck*, 351 U. S. at 436, this Court stated, in substance, that "finality" is not present, when

that which is dismissed is "inherently inseparable from, or closely related to", that which remains for disposition.

Amana's claim for relief is bottomed upon one set of intertwined and closely related factual occurrences or transactions: the making of and terms of the "integral agreement" of sponsorship of The Phil Silvers Show over the CBS Television Network. Amana's sole right to relief, its standing to sue, and any claim for injury Amana may have, are based (if they exist at all) solely on that one set of facts.

However, Amana contends that it may assert separate claims for relief from which it may appeal piecemeal by focusing separately upon each of three interrelated parts of the totality of facts involved.

Amana claims: that under the "integral agreement" of sponsorship it did not receive the same discounts as others (Part 1); that under the "integral agreement" it was compelled to sponsor broadcasts of The Phil Silvers Show over a specified group of television stations (Part 2); and that in order for it to sponsor a broadcast over the CBS Television Network under the "integral agreement", it was forced to select The Phil Silvers Show because CBS had a financial interest therein (Part 3). The common thread is Amana's sponsorship of The Phil Silvers Show, the amount it was required to pay to CBS for its services in connection therewith, and the "integral agreement" pursuant to which each of those obligations was fixed.

Clearly, but one counterclaim is presented. The "central core" of facts in the counterclaim is asserted in paragraphs 2 through 7, inclusive. Amana's reallegation of that "central core" of facts in each of the three intertwined parts of the counterclaim shows the interrelationship of each of those parts. Indeed, the only difference between each part of the counterclaim is the assertion of additional paragraphs for the sole purpose of characterizing that

"central core" of facts and tailoring it to the legal theory there asserted.

The rule appears clear that an appeal will not lie when but one set of factual occurrences or transactions is asserted, although portions thereof are separated to suit differing legal theories. *U. S.* v. *New York, New Haven & Hartford R. R. Co.*, __ F. 2d __, 28 L. W. 2396 (2d Cir. Feb. 5, 1960); *Seaboard Machinery Corp.* v. *Seaboard Machinery Corp., supra*, 267 F. 2d 178; *Schwartz* v. *Eaton, supra*, 264 F. 2d 195; *Cott Beverage Corp.* v. *Canada Dry Ginger Ale, Inc., supra*, 243 F. 2d 795; *Gold Seal Co.* v. *Weeks, supra*, 209 F. 2d 802; *Clark* v. *Taylor*, 163 F. 2d 940 (2d Cir. 1947). Analytically, this result follows when, as is the case here, the entire transaction remains for consideration and disposition, but with the number of legal theories urged in support of recovery reduced by one. As stated in the *Clark* case:

> "... The theory adopted in the new rules, including the pertinent rule here, 54(b), ... has been that the 'transaction' or 'occurrence' is the subject matter of a claim, rather than the legal rights arising therefrom; additions to or subtractions from the central core of fact do not change this substantial identity so as to support piecemeal appeals. See Petrol Corporation v. Petroleum Heat & Power Co. 2 Cir., 162 F. 2d 327, and cases and authorities there cited." 163 F. 2d at 942-943.

In *Cott*, 243 F. 2d at 796, the Second Circuit reaffirmed that interpretation stating that this Court in *Sears, Roebuck* did not hold that "...any variation in legal theory, ..." constitutes a separable claim based upon different transactions or occurrences. And, in the recent *New Haven* case, various statutory bases and theories for declaring a contract to be invalid were asserted in separated "counts" but, in holding the order dismissing one of those "counts"

to be interlocutory, Judge Friendly stated "... The judgment plainly was not final even as to the transactions here challenged, since other theories of liability remained".

Indeed, by its pleading, Amana concedes that the same factual occurrences are intertwined in each of the three parts of the counterclaim. The counterclaim is labeled as a single counterclaim and is referred to as such in the averments thereof (pars. 13 and 17).

Moreover, the "integral agreement" which gives rise to the counterclaim also gives rise to the complaint by which CBS seeks to recover moneys due from Amana for services rendered by CBS thereunder.

Thus, there still are before the District Court not only the claim of Amana but also the claim of CBS, both of which arise out of the same transaction or set of factual occurrences. The order sought to be appealed from is, therefore, not final. *Seaboard Machinery Corp.* v. *Seaboard Machinery Corp., supra,* 267 F. 2d 178. Compare *United States Plywood Corp.* v. *Hudson Lumber Co.*, 210 F. 2d 462 (2d Cir. 1954); *Toomey* v. *Toomey*, 149 F. 2d 19, 20 (D. C. Cir. 1945).

II.

THE DISTRICT COURT'S DECISION IS NOT RIPE FOR REVIEW.

The Court of Appeals did not pass upon the substantive issues decided by the District Court. Hence, the District Court's decision is not ripe for review, because this Court, recognizing the advantage which is inherent in intermediate consideration of issues by the courts of appeals, has generally refused to pass on questions not considered by them. *Swanson* v. *Tracr*, 354 U. S. 114 (1957); *Owens* v. *Union Pacific R. R. Co.*, 319 U. S. 715, 724-725 (1943); *Husty* v.

United States, 282 U. S. 694, 701-702 (1931); *Liberty Oil Co.* v. *Condon National Bank*, 260 U. S. 235, 245 (1922). See also Robertson & Kirkham, *Jurisdiction of the Supreme Court of the United States*, 231-237, 241-242 (1951).* It is the same policy which this Court applies in granting certiorari prior to judgment by the courts of appeals only in rare cases of transcendent national importance.** Obviously, this case is not of that nature, and Amana advances no satisfactory reason why this Court should now depart from the customary policy and decide the substantive issue without first having the benefit of its consideration by the Court below.

The cases cited by Amana are not to the contrary. The courts of appeals had, in each of those cases, considered at least some of the substantive issues involved. Under such circumstances, it would not have been expedient for this Court to avoid disposition of the entire case by remanding the remaining related issues for disposition. The circumstances of this case are wholly different. For this Court to review the substantive issues decided by the District Court without giving the Court of Appeals an opportunity to pass thereon would result in disruption of orderly judicial procedure.

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*Compare also *United States* v. *F. & M. Schaefer Brewing Co.*, 356 U. S. 227 (1958); *Jung* v. *K. & D. Mining Co.*, 356 U. S. 335 (1958); *Lemke* v. *United States*, 346 U. S. 325 (1953); *Hill* v. *Hawes*, 320 U. S. 520 (1944); *Leishman* v. *Associated Wholesale Electric Co.*, 318 U. S. 203 (1943). There this Court entertained jurisdiction of procedural questions but did not go on to review the substantive issues which the courts of appeals had not yet passed upon.

**E.g. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579 (1952); *United States* v. *United Mine Workers*, 330 U. S. 258 (1947); *Ex Parte Quirin* 317 U. S. 1 (1942); *Norman* v. *Baltimore & Ohio R. Co.*, 294 U. S. 240 (1935). Even in such extraordinary cases this Court has on occasion required the issues to mature through the ordinary course of considerations by the courts of appeals. *Aaron* v. *Cooper*, 357 U. S. 566 (1958).

It is, of course, no answer for Amana to say that such action is justified simply because a nice legal question is supposedly presented, which it would be convenient for this Court to resolve "... so that the Federal courts, as well as many advertiser and media litigants, present and potential, can be apprised of the law and guide themselves accordingly" (Pet. 17). No principle is more firmly established than that this Court will not render such opinions, even where the parties join in requesting it. *Barr* v. *Matteo*, 355 U. S. 171 (1957).

Even if this Court were to grant such opinions, Amana's petition presents no sound basis therefor. Section 2(a) of the Clayton Act (15 U. S. C. § 13(a)) is by its terms limited to discriminations between "*purchasers*" of "*commodities*" of "*like grade and quality*". The legislative history and the Committee reports and debates on the floors of Congress make clear that Congress, in passing Section 2(a) did not have in mind the furnishing of services or the sale of intangibles—and services and intangibles are all that are here involved. Moreover, the cases* conclusively and uniformly establish that the District Court's decision was correct. It will be time enough for this Court to intervene if, through the normal appellate process, a conflict should ever develope on the issue.

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*E.g., *Fleetway, Inc. v. Public Serv. Interstate Transp. Co.*, 72 F. 2d 761 (3d Cir. 1934), *cert. denied*, 293 U. S. 626 (1935); *General Shale Products Corp.* v. *Struck Const. Co.*, 132 F. 2d 425 (6th Cir. 1942), *cert. denied* 318 U. S. 780 (1943); *Auto Acetylene Lights Co.* v. *Prest-O-Lite Co.*, 276 Fed. 537 (6th Cir. 1921), *cert. denied* 258 U. S. 622 (1922); *George W. Warner & Co.* v. *Black & Decker Mfg. Co.*, 172 F. Supp. 221 (E. D. N. Y. 1959); *United States* v. *Investors Diversified Servs.*, 102 F. Supp. 645 (D. Minn. 1951). See also *Nelligan* v. *Ford Motor Co.*, 161 F. Supp. 738 at 742, n. 2 (W. D. S. C. 1958), *aff'd*, 262 F. 2d 556 (4th Cir. 1959); *Scott Publishing Co., Inc.* v. *Columbia Basin Publishers, Inc.*, 1959 CCH Trade Cases, par. 69,589 (W. D. Wash. 1959).

CONCLUSION

The petition should be denied.

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